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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OSHEA WHITE, Defendant and Appellant.	G055134 (Super. Ct. No. 16WF2525) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Brendon Marshall and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

The primary issue in this case is identification. Appellant contends there is insufficient evidence to support the jury's determination he is the person who assaulted and attempted to rob the elderly proprietor of a coin shop in Huntington Beach. But, appellant's phone was found at the scene of the crime, and it contained text messages indicating he intended to commit a robbery that day. We believe these facts, combined with the other evidence presented at trial, constitute substantial evidence to support the jury's verdict. We are also convinced the trial court's evidentiary rulings were correct, despite appellant's claim they violated his state and federal rights. We thus affirm the judgment.

FACTS

On October 17, 2015, at around 5:30 p.m., Huntington Beach Police Officer Michael Dexter responded to an audible burglar alarm at the A & E Coin store. Upon arrival, Dexter noticed the lights in the store were off, but the front door was unlocked and an "open" sign was displayed in the window. Although Dexter did not see anyone when he initially entered the store, a few seconds later, 84-year-old Daryl Brotman – the store's proprietor – emerged from the back office. Brotman had cuts on his face and blood coming from his left ear. Appearing dazed and confused, he twice asked Dexter if he had the keys to the store. Dexter said he did not and explained he was there because the store's security alarm had gone off. He then asked what happened, and Brotman said a black man with a gun had robbed him a couple hours earlier.

Hearing this, Dexter conducted a protective sweep of the store to look for additional victims and/or suspects. It turned out no one else was in the store, and nothing appeared to be out of order. However, in the back of the store, near the restroom, Dexter noticed a hearing aid and some paper towels on the floor. And inside the back office, near the floor safe, he found a cell phone that was broken into three pieces. The safe was closed and did not appear to have been tampered with. Although the store was equipped

with a security camera, it was set to project a live feed, not record, so there is no surveillance footage available of what occurred at the store that day.

When the paramedics arrived, Brotman refused treatment and asserted he was well enough to drive home. However, Dexter disagreed and arranged for one of Brotman's friends to pick him up. The next day, Brotman went to the emergency room and was diagnosed with a subdural hematoma that was consistent with recent head trauma. He underwent surgery the following day to relieve blood and fluid buildup in his skull.

Meanwhile, the police obtained a warrant to search the broken cell phone that was found in Brotman's store. They discovered the phone was registered to appellant, who is African-American, and contained several "selfie" photos of appellant sitting inside a vehicle. It also contained a photo of two checks written to appellant and a photo of a black man's hand holding a gun and duct tape next to a steering wheel. The steering wheel in the gun photo appeared to be from the same car in which appellant's selfies were taken. Investigators were unable to determine when the gun photo was taken, but they were able to ascertain the file for the photo was created on appellant's phone on October 17, 2015, the day in question.

In addition to the gun photo, appellant's phone also contained a treasure trove of text messages from that day. At 1:07 p.m., appellant sent a message to a person named Trish saying, "Let's rob them mfs that owe you fucc it lol." Around 2:00 p.m., appellant texted, "I'm out tryna rob something I'm so broke." That message was soon followed by texts in which appellant stated, "Now a lady and kid walked in" and "3 burgers left."[1] In another outgoing text, at 3:36 p.m., appellant wrote, "Lookin good," and then at 4:10 p.m. he declared, "I'm going in." Investigators also recovered a deleted

[1] According to www.urban dictionary.com, the term "burger" is slang for someone "who royally sucks at simple tasks."

text message on appellant's phone that read, "Duck taped robbed n popped his ass." However, they could not tell when that message was created or sent.

Glen Stringer and David Handler regularly volunteered at the coin store and were there with Brotman on the day in question. Stringer left the store around 3:30 that afternoon, and Handler left at about 4:00 p.m., roughly 10 minutes before appellant announced on his phone that he was "going in."

Based on cell tower data gathered from appellant's phone, investigators were able to determine the phone was used several times near appellant's home in Lynwood on the morning in question. Then, as the day wore on, the phone moved toward Brotman's coin store in Huntington Beach. In fact, appellant's phone was in the vicinity of the store for several hours before it finally went dead at 4:10 p.m. that day. Service on the phone was disconnected two days later, on October 19, 2015.

Following a jury trial, appellant was convicted of attempted second degree robbery and elder abuse. The jury also found Brotman was a vulnerable victim and appellant inflicted great bodily injury on him. However, the jury was unable to reach a verdict on the allegation appellant used a firearm during the offenses. The trial court sentenced appellant to 11 years in prison, including a two-year term on a separate case in which he was convicted of robbing and inflicting great bodily injury on an elderly woman in Los Angeles.

DISCUSSION

Sufficiency of the Evidence

Appellant contends there is insufficient evidence to support his convictions. In particular, he claims the record is bereft of substantial evidence he is the person who assaulted and attempted to rob Brotman or that an attempted robbery even took place inside Brotman's store. We disagree.

The standard of review for assessing the sufficiency of the evidence to support a criminal conviction is "highly deferential." (*People v. Lochtefeld* (2000) 77

Cal.App.4th 533, 538.) Our task is to review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence of the defendant's guilt. (*People v. Alexander* (2010) 49 Cal.4th 846, 917.) In so doing, "[w]e presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*Ibid.*) "'The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence . . . . [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.]'" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

Regarding the issue of whether an attempted robbery occurred in this case, we must keep in mind that a person may be convicted of attempting to commit a crime even if the intended crime was not actually committed or was incapable of being committed. (*People v. Chandler* (2014) 60 Cal.4th 508, 517.) All the law requires is proof of a direct act aimed at the commission of a crime. (*Ibid.*, citing Pen. Code, § 21a.) Thus, it is not dispositive that, as appellant points out, nothing was disturbed or stolen from Brotman's store on the day in question.

It is telling, however, that when the police responded to the burglar alarm at the store, Brotman was bleeding about the head and face and reported he had been robbed at gunpoint. In addition, appellant's broken cell phone was found near the store's floor safe, and messages on the phone indicated appellant was out to commit a robbery that day. Taken together, this evidence is sufficient to support the jury's determination that someone tried to rob Brotman.

There is also substantial evidence that appellant was that person. Brotman said he was robbed by a black man, and appellant is African-American. One of his texts said there were "3 burgers left," and at the time it was sent, Brotman and two others were manning the store. Handler left Brotman alone in the store at about 4:00 p.m., and 10 minutes later appellant declared in a text message that he was "going in." The messages

on appellant's phone also indicated he was in the vicinity of the store for several hours before then, keeping tabs on who was inside. And, in what stands out as perhaps the most revealing text of all, appellant stated he was looking to "rob something" because he was "so broke." It's rare to see such direct evidence of the defendant's intent in a criminal case.

Against this inculpatory backdrop, appellant argues there was evidence that other people used his phone, so it is possible that someone else may have sent the incriminating text messages that were found on the device. Appellant's phone did contain a few messages that were sent by a person identifying himself as "Eric." But those messages were sent on October 15, 2015, two days before the incident in question took place. With respect to the messages that were sent on the day in question, there is no evidence they were authored by anyone other than appellant.

Appellant also points out that not every text message found on his phone corresponded precisely to the evidence in this case. For example, Brotman told the police he was robbed a couple hours before they arrived at his store, which would have been around 3:30, about 40 minutes before appellant texted that he was going into the store. And in another text, appellant referenced "duck tape" (*sic*), but no tape was found at the scene of the crime.

These arguments overlook the fact that Brotman was injured and confused when the police first contacted him, which would explain why his time estimate of the robbery was not spot on, and that the absence of incriminating evidence or weaknesses in the prosecution's case are not dispositive of a sufficiency-of-the-evidence claim. (See *People v. Story* (2009) 45 Cal.4th 1282, 1299.) "The question is not whether the jury reasonably could have reached a different conclusion. Instead, it is whether any reasonable trier of fact could have reached the same conclusion as the jury." (*People v. Thomas* (2017) 15 Cal.App.5th 1063, 1073.)

Considering all of the evidence presented in this case, the answer to that question is a resounding yes. We are firmly convinced that a reasonable trier of fact could conclude both that someone attempted to rob Brotman, and that the someone was appellant. We therefore reject appellant's challenge to the sufficiency of the evidence.

Admissibility of Brotman's Statement

Appellant also contends the trial court erred in admitting Brotman's statement he was robbed at gunpoint by a black man a couple of hours before he was contacted by the police. Appellant argues the statement constituted inadmissible hearsay and its admission violated his federal confrontation rights, but we do not see it that way.

The admissibility of Brotman's statement was litigated at an evidentiary hearing before trial. At the hearing, Officer Dexter testified that when he first contacted Brotman at the coin store, he noticed Brotman had cuts on his lip, abrasions on the left side of his face, and blood coming from his left ear. Brotman also seemed confused, gave "weird responses" to Dexter's questions, and twice asked Dexter if he had the keys to the store. Sensing something was amiss, Dexter asked Brotman what happened, and he said a black man had robbed him at gunpoint a couple of hours earlier. According to Dexter, Brotman made this statement approximately 20 seconds after he first entered the store.

In response to the statement, Dexter conducted a protective sweep of the store that revealed no other people were there. Then he turned his attention back to Brotman, who, while calm, complained of dizziness and continued to appear confused and disoriented. Dexter asked him about the robbery, and Brotman said the gunman took him to the back office and was trying to tie him up when he felt something hard strike him on the side of his face. That is all Brotman could remember with respect to his interaction with the gunman. Later, after the police arrived, Brotman refused to be treated by the paramedics, so Dexter called a friend to come and pick him up. While they

were waiting for the friend to arrive, Brotman told Dexter a money bag containing $7,000 in cash was missing from his store.

Because Brotman did not testify at trial, the defense argued his statements to Dexter were inadmissible on hearsay and confrontation grounds. In addressing that issue, the trial court drew a distinction between Brotman's statements. Regarding his initial claim about being robbed at gunpoint by a black man, the court ruled that statement was nontestimonial for purposes of the Sixth Amendment's Confrontation Clause because it was intended to enable the police to address an emergency situation. The court also found the statement was made while Brotman was still under the stress of excitement from the alleged robbery, so it came within the spontaneous declaration exception to the hearsay rule. The court thus allowed the prosecution to introduce the statement at trial. However, with respect to the statements Brotman made after the protective sweep of the store, the court determined they were testimonial because they were elicited "with an eye toward building a case" against the gunman. Therefore, they were inadmissible under the Sixth Amendment.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) There is no dispute that Brotman's initial statement about being robbed meets this definition and that hearsay evidence is generally inadmissible at trial. (*Id*. at subd. (b).) It is equally clear that unless the declarant is both unavailable at trial and the defendant had a prior opportunity for cross-examination, criteria which were absent here, admission of the declarant's prior "testimonial" statements violates the confrontation clause. (*Crawford v. Washington* (2004) 541 U.S. 36, 59.) Thus, as the trial court properly recognized, Brotman's statement about being robbed was only admissible if it satisfied an exception to the hearsay rule and was nontestimonial in nature. (*People v. Sanchez* (2016) 63 Cal.4th 665, 680.)

Our analysis of the confrontation clause issue starts with the recognition that statements given in response to formal police interrogation are generally considered testimonial for purposes of the Sixth Amendment. (See *Crawford v. Washington, supra*, 541 U.S. at p. 68; *Hammon v. Indiana* (2006) 547 U.S. 813, 829-832.) That's because such statements are commonly used to establish a suspect's guilt in a court of law. However, not all police questioning is subject to the confrontation clause: The Sixth Amendment is implicated if "'the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution[,]'" but "'[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" (*Michigan v. Bryant* (2011) 562 U.S. 344, 356, quoting *Davis v. Washington* (2006) 547 U.S. 813, 822.)

The circumstances facing Officer Dexter at the coin store were unsettled and unsettling. Responding to a burglar alarm, he arrived there to find the front door unlocked, but the lights off, and no one present in the front of the store. And when Brotman wandered out from the back office, he had multiple head wounds, appeared confused and had trouble expressing himself. Not knowing how Brotman was injured, Dexter asked him what had happened. From all appearances, the question was designed to elicit information that would assist Dexter in formulating an appropriate response to the situation; Dexter was trying to find out what was going on and what to do; he had an elderly man who clearly needed help. While the circumstances suggested Brotman had been assaulted in the course of a burglary, Dexter had no idea who assaulted him, or if the assailant was still in the area.

These facts demonstrate Dexter was dealing with an ongoing emergency, particularly before he conducted a protective sweep of the store. Therefore, his questions to Brotman at that time did not implicate the confrontation clause. (*Michigan v. Bryant, supra*, 562 U.S. at pp. 371-378 [on-the-scene questioning of gunshot victim did not

implicate the confrontation clause because it occurred while the shooter was still at large]; compare *Hammon v. Indiana, supra,* 547 U.S. 813 [victim's statements found to be testimonial because they were elicited *after* the suspect was already in custody]; *People v. Cage* (2007) 40 Cal.4th 965, 984-987 [victim's statements deemed testimonial because they were elicited *after* the danger arising from the underlying incident had already passed].) Consequently, the admission of Brotman's statement about being robbed by a black man at gunpoint did not violate appellant's Sixth Amendment rights.

Turning to the hearsay issue, the main point of contention is whether Brotman made this statement "spontaneously while [he] was under the stress of excitement caused by" the alleged robbery, so as to fall within the spontaneous declaration exception to the hearsay rule. (See Evid. Code, § 1240.) In arguing Brotman did not, appellant notes the alleged robbery occurred a couple hours before Brotman made the statement, the statement was made in response to police questioning, and Brotman was rather calm when he made it. While relevant, these factors are not dispositive of the central issue presented, which is whether Brotman's statement was an uninhibited expression of his true beliefs as opposed to a product of reflection or fabrication. (*People v. Merriman* (2014) 60 Cal.4th 1, 64; *People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) Because that issue is factually driven, the trial court's assessment of it is entitled to considerable deference; we will not disturb the trial court's finding that Brotman's statement was spontaneous unless the court clearly abused its discretion. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

In addition to the factors noted by appellant, the record shows Brotman was wounded, weary and bewildered when Dexter asked him what happened. Indeed, the fact Brotman had facial injuries and blood coming from his ear indicated he had suffered some sort of head trauma, and his confused affect and odd responses to Dexter's questions signaled his reflective powers were significantly impaired. Given Brotman's

overall condition – he had a subdural hematoma that required surgery – it is quite possible he was incapacitated altogether from the time of the alleged robbery until the time Dexter arrived on the scene.

Not only was Brotman laboring under obvious mental and physical difficulties when he said he had been robbed, he made that statement to Dexter about 20 seconds into their conversation, while Dexter was still trying to figure out what was going on and how to respond to the situation. This further diminishes the chances it was fabricated, coached or confabulated. (*Michigan v. Bryant*, *supra*, 562 U.S. at pp. 361-362 [the very circumstances that tend to make a statement nontestimonial for purposes of the Sixth Amendment also tend to make it spontaneous for purposes of the hearsay rule].) All things considered, we cannot say the trial court abused its discretion in ruling the statement qualified for admission under the spontaneous declaration exception to the hearsay rule. As such, we have no occasion to disturb that ruling. (See *People v. Clark* (2011) 52 Cal.4th 856, 926 [victim's statement deemed admissible as spontaneous declaration even though she made it several hours after the defendant physically assaulted her].)

Due Process Claim

Lastly, appellant argues the introduction of his text messages and the photograph of a man's hand holding a gun and duct tape violated his due process right to a fair trial. Again, we are not persuaded.

Appellant's challenge to the text messages is based largely on the fact that only one of the messages sent from his phone on the day of the attempted robbery specifically mentioned him by name, and none of the other messages contained the names of the people who were sending or receiving them. On this record, appellant contends there was an insufficient foundation to prove he is the person who sent the messages. However, text messages tend to be informal and sent between people who know each other. There are lots of reasons people do not attach their name to the messages they

send out. Despite the absence of names on the subject messages, the fact remains they were all sent from appellant's phone, and on the day in question, the phone traveled from the vicinity of appellant's house to the vicinity of the coin store. This is sufficient evidence to support the trial court's preliminary determination that appellant is the person who authored the incriminating messages that were found on his phone. (See generally *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435 [the foundation for the admissibility of a writing may be established by circumstantial evidence].)

Appellant also contends his text messages were irrelevant and unduly prejudicial because they referenced items – such as duct tape – that were not found at the crime scene, and they talked about appellant committing robbery and needing money. However, the messages about committing robbery and needing money lent credence to the prosecution's theory that appellant is the person who assaulted and attempted to rob Brotman, which was the central issue in the case. The evidence may have been prejudicial to appellant in that it implicated him in the charged offenses, but it was not unfair in the sense it would make the jury want to convict him for irrelevant or improper reasons. And while no duct tape was found inside Brotman's store, tape is a common tool of the trade for people who commit store robberies. The fact appellant referenced it in a text about "rob[bing]" and pop[ping]" someone was relevant to shed light on the central issue of identification.

The same reasoning applies to the photograph on appellant's phone of a black hand holding duct tape and a gun next to a steering wheel. Appellant contends there was insufficient evidence to establish the hand in the photo was his or that the photo had any logical bearing on the issues presented at trial. But duct tape can be very useful to robbers, and Brotman said he was robbed at gun point by a black man. Moreover, the steering wheel in the photo appeared to be from the same car in which appellant's selfie photos were taken. Suffice it to say, there was a sufficient basis to conclude the person holding the tape and gun was appellant, which logically tended to prove his guilt of the

charged offenses. The court did not err in admitting the photo into evidence. Its decision to do so did not violate appellant's rights in any respect.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.